Powernet Industries Sdn Bhd v Golden Wheel Credit Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-04(IM)(NCC)-700–12 OF 2019
SURAYA OTHMAN, HAS ZANAH MEHAT AND NANTHA BALAN JJCA
10 JUNE 2020

Civil Procedure — Appeal — Defendant appealed against sessions court's decision which allowed plaintiff's suit for recovery of money — High Court allowed defendant's appeal by striking out plaintiff's suit — High Court allowed plaintiff to file fresh suit — Defendant appealed against High Court's decision in allowing plaintiff filed fresh suit — Whether there was non-compliance of s 16 of the Moneylenders Act by plaintiff — Whether plaintiff entitled to file fresh suit against defendant — Rules of Court 2012 O 18 r 19(1)(b), (1)(d) — Moneylenders Act 1951 s 16

There were two appeals namely Civil Appeal No W-04(IM)(NCC)-700–12 of 2019 ('Appeal 700') and Civil Appeal No W-04(IM)(NCC)-701–12 of 2019 ('Appeal 701'). Both appeals originated from suits that were filed in the sessions court. The plaintiff was a licenced moneylender. The defendant borrowed monies from the plaintiff. The defendant made some payments and then they defaulted. The plaintiff filed an action in the sessions court for the recovery of monies that were lent to the defendant. The defendant alleged that the relevant moneylending agreement contravened the Moneylenders Act 1951 ('the Act'). They applied under O 18 r 19(1)(b) and (1)(d) of the Rules of Court 2012 to strike out the suit. The application to strike out the suit was dismissed by the sessions court. On appeal, the High Court allowed the defendant's appeal and struck out the suit. The High Court granted liberty to the plaintiff to file a fresh suit. Although the suit was struck out by the High Court, the defendant nevertheless appealed to the court and contended that the plaintiff should not have been granted liberty to file a fresh suit. The appeal made was against that part of the decision of the High Court which granted liberty to the plaintiff to file a fresh suit. On 29 December 2017, the plaintiff and the defendant entered into a moneylending agreement ('the agreement') whereby the plaintiff agreed to provide a loan of RM500,000 to the defendant with interest at the rate of 18%pa. The loan was released to the defendant on 29 December 2017 which was the same date as the agreement. A stamped copy of the agreement was delivered to the defendant on 28 June 2018. After making some instalment payments, the defendant defaulted in the loan repayments. By a letter of demand dated 15 February 2019, the plaintiff demanded the outstanding sum of RM75,915.07 and notified the defendant that the agreement will be deemed terminated if the defendant failed to settle the said outstanding sum within 14

days from the date of the letter of demand. The defendant failed to pay the outstanding sum that was claimed in the letter of demand. According to the plaintiff, the agreement was deemed terminated on 2 March 2019 and all the unpaid instalments under the agreement became due and payable on 2 March 2019. On 26 March 2019, the plaintiff commenced the action against the defendant claiming for repayment of the sum of RM325,677.77 which was due and owing under the agreement. The stance taken by the defendant was that the plaintiff had breached various provisions of the Act. The counsel for the defendant relied on s 16 of the Act and contended that the agreement was in breach of s 16 of the Act because the loan was remitted to the defendant before a stamped copy of the agreement was delivered to the defendant. It was contended by the plaintiff that the defendant was estopped from raising the issue of non-compliance with s 16 of the Act as it was the defendant who were desperate for the funds and had waived compliance with the provisions of the Act.

Held, allowing appeal with cost of RM5,000 and setting aside prayer (b) of the High Court:

(1) There was no doubt that s 16 of the Act was intended to ensure that the duly stamped copy of the moneylending agreement was delivered to the borrower before the money was lent so that there was no dispute as to the terms of the agreement. Once the borrower was in possession of a stamped copy of the relevant moneylending agreement, then it would eliminate the possibility for any dispute later. A strict adherence to s 16 of the Act would ensure that the version of the agreement relied upon by the moneylender, would be the same document which was previously executed by the borrower. If waiver was allowed, then it would defeat the operation of s 16 of the Act or any other provision of the Act and it would open the proverbial floodgates for a court sanctioned breach of the Act. The court was of the view that the Act was a manifestation of a social legislation and is designed to regulate the business of moneylending and to protect borrowers. As such, regardless of the circumstances which gave rise to the waiver or estoppel, a moneylender could not rely on such waiver or estoppel to preclude the borrower from asserting his rights as provided for under the under the Act. In the context of a contravention of s 16 of the Act, the borrower was entitled to raise and rely upon the moneylender's contravention of the Act in opposing the claim for recovery of the monies that were lent (see paras 77–78, 80 & 84).

(2) The grant of liberty to file afresh might give an opportunity for the plaintiff to rectify the procedural non-compliance with other provisions of the Act. The non-compliance with s 16 of the Act was a different matter altogether as it was not capable of being rectified or remedied even if a fresh suit was filed. A new suit would not overcome the breach of s 16 of the Act as the events had already occurred, namely, the loan was

disbursed to the defendant on or around 29 December 2017 and a stamped copy of the agreement was only given to the defendant on 28 June 2018. The chronology of events could not be undone. In the circumstances, it was plainly wrong in granting liberty to the plaintiff to file its claim afresh against the defendant as a fresh suit was doomed to fail by reason of the contravention of s 16 of the Act (see paras 88–89).

[Bahasa Malaysia summary

Terdapat dua rayuan, iaitu Rayuan Sivil No W-04(IM)(NCC)-700–12 Tahun 2019 ('Rayuan 700') dan Rayuan Sivil No W-04(IM)(NCC)-701–12 Tahun 2019 ('Rayuan 701'). Kedua-dua rayuan berasal daripada guaman yang difailkan di mahkamah sesyen. Plaintif merupakan peminjam wang berlesen. Defendan telah meminjam wang daripada plaintif. Defendan telah membuat beberapa pembayaran dan mereka kemudiannya gagal untuk membuat bayaran. Plaintif telah memfailkan tindakan di mahkamah sesyen untuk mendapatkan semula wang yang telah dipinjamkan kepada defendan. Defendan mengatakan bahawa perjanjian peminjaman wang yang berkaitan melanggar Akta Peminjam Wang 1951 ('Akta tersebut'). Mereka memohon dibawah A 18 k 19(1)(b) dan (1)(d) Kaedah-Kaedah Mahkamah 2012 untuk membatalkan guaman tersebut, permohonan untuk membatalkan telah ditolak oleh mahkamah sesyen. Di peringkat rayuan, mahkamah tinggi membenarkan rayuan defendan dan membatalkan guaman tersebut. Mahkamah tinggi memberikan kebebasan kepada plaintif untuk memfailkan satu guaman baru. Walaupun Mahkamah Tinggi telah membatalkan guaman tersebut, defendan telah memfailkan rayuan kepada mahkamah dan mengatakan bahawa plaintif tidak sepatutnya diberikan kebebasan untuk memfailkan satu guaman baru. Pada 29 Disember 2017, plaintif dan defendan telah memasuki satu perjanjian pinjaman wang ('perjanjian tersebut') yang mana plaintif bersetuju untuk memberikan pinjaman RM500,000 kepada defendan dan kadar faedah 18% setahun. Pinjaman yang diberikan kepada defendan pada 29 Disember 2017 adalah pada tarikh yang sama dengan perjanjian. Salinan perjanjian yang telah disetem telah dihantar kepada difendan pada 28 Jun 2018. Selepas membuat beberapa bayaran ansuran, defendan telah gagal untuk membuat pembayaran semula pinjaman. Melalui satu surat tuntutan bertarikh 15 Februari 2019, plaintif menuntut jumlah tertunggak RM75,915.07 dan memaklumkan defendan bahawa perjanjian tersebut akan dikira sebagai ditamatkan sekiranya defendan gagal untuk melangsaikan jumlah tertunggak yang dituntut dalam surat tuntutan tersebut. Defendan gagal untuk membayar jumlah tertunggak yang dituntut dalam surat tuntutan tersebut. Mengikut plaintif, perjanjian tersebut dianggap ditamatkan pada 2 Mac 2019 dan semua ansuran yang belum dibayar dibawah perjanjian tersebut telah menjadi terhutang dan perlu dibayar pada 2 Mac 2019. Pada 26 Mac 2019, plaintif telah memulakan tindakan terhadap defendan menuntut pembayaran semual jumlah RM325,677.77 yang terhutang dibawah perjanjian. Kedudukan yang diambil oleh defendan adalah

bahawa plaintif telah melanggar beberapa peruntukan Akta tersebut. Peguam untuk defendan bergantung kepada s 16 Akta tersebut dan mengatakan bahawa perjanjian tersebut melanggar s 16 Akta tersebut kerana pinjaman tersebut diremitkan kepada defendan sebelu satu salinan bersetem perjanjian telah diserahkan kepada defendan. Plaintif mengatakan bahawa defendan terhalang daripada menimbulkan isu ketidakpatuhan s 16 Akta tersebut kerana ianya merupakan defendan yang memerlukan wang tersebut dan telah mengetepikan pematuhan peruntukan Akta tersebut.

Diputuskan, membenarkan rayuan dengan kos RM5,000 mengetepikan permohonan (b) Mahkamah Tinggi:

(1) Tiada keraguan bahawa s 16 Akta bertujuan untuk memastikan bahawa perjanjian pinjaman yang disetem telah diserahkan kepada peminjam sebelum wang tersebut dipinjamkan supaya tiada pertelingkahan mengenai terma perjanjian. Selepas peminjam mempunyai milikan salinan bersetem perjanjian peminjaman yang berkaitan, ianya akan mengelakkan sebarang kebarangkalian pertelingkahan kelak. Pematuhan ketat s 16 Akta tersebut akan memastikan bahawa versi perjanjian yang peminjam bergantung kepada adalah dokumen yang sama yang ditandatangani oleh peminjam. Sekiranya pengetepian dibenarkan, ianya akan membatalkan kegunaan s 16 Akta tersebut atau apa-apa peruntukan Akta tersebut dan ianya akan membenarkan mahkamah untuk melanggar Akta tersebut. Mahkamah berpandangan bahawa Akta tersebut merupakan satu manifestasi undang-undang sosial yang dibuat untuk mengawal perniagaan peminjaman wang dan melindungi peminjam, seorang peminjam wang tidak boleh bergantung kepada sebarang pengenepian atau estopel untuk menghalang peminjam daripada meminta haknya sepertimana yang diperuntukan dibawah akta. Dalam konteks pelanggaran s 16 Akta, peminjam berhak untuk membangkitkan dan bergantung kepada pelanggaran akta dalam menentang tuntutan untuk mendapatkan semula wang yang telah dipinjamkan (lihat perenggan 77–78, 80 & 84).

(2) Pemberian kebebasan untuk memfailkan semula mungkin memberikan peluang kepada plaintif untuk membetulkan ketidakpatuhan prosedural dengan peruntukan lain akta. Pelanggaran s 16 Akta tersebut adalah perkara yang berbeza dan ianya tidak boleh dibetulkan atau dipulihkan walaupun satu guaman baru difailkan. Guaman baru tidak akan memulihkan pelanggaran s 16 Akta tersebut kerana kejadian telah pun berlaku, iaitu pinjaman telahpun diberikan kepada defendan pada atau sekitar 29 Disember 2017 dan satu salinan bersetem perjanjian hanya diberikan kepada defendan pada 28 Jun 2018. Kronologi kejadian tidak boleh diuraikan. Dalam keadaan ini, ianya adalah salah dalam memberikan kebebasan untuk plaintif memfailkan tuntutan yang baru terhadap defendan kerana satu guaman baru akan gagal atas sebab

pelanggaran s 16 Akta tersebut (lihat perenggan 88–89).] A

Cases referred to

AEH Capital Sdn Bhd v AM-EL Holdings Sdn Bhd and another appeal [2008] 4 MLJ 487, CA (refd)
Alfred Templeton & Ors v Mount Pleasure Corp Sdn Bhd [1989] 2 MLJ 202; [1989] 1 CLJ 693; [1989] 1 CLJ Rep 219, HC (refd) B
Arjan Singh, Son of Inder Singh v Hashim Angullia & Ors [1941] 1 MLJ 55; [1941] 1 LNS 4, HC (refd)
Chase Perdana Bhd v Md Afendi bin Hamdan [2009] 6 MLJ 783; [2009] MLJU 717, FC (refd) C
Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346; [2001] 2 CLJ 321, CA (refd)
Co-operative Central Bank Ltd (in receivership) v Feyen Development Sdn Bhd [1995] 3 MLJ 313; [1995] 1 AMR 2751, FC (refd) D
Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd [1991] 1 MLJ 404; [1991] 1 CLJ 656; [1991] 1 CLJ Rep 174, SC (refd)
Johnson v Moreton [1980] AC 37; [1978] 3 All ER 37; [1978] 3 WLR 538; 37 P & CR 243; 122 Sol Jo 697; [1978] 2 EGLR 1; 241 Estates Gazette 759, HL (refd) E
Kok Hoong v Leong Cheong Kweng Mines Ltd [1964] 1 MLJ 49; [1964] AC 993, PC (refd)
Phileo Allied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor [1999] 3 MLJ 157; [1999] 2 CLJ 1023, CA (folld)
Powernet Industries Sdn Bhd v Golden Wheel Credit Sdn Bhd [2019] MLJU 1865; [2020] 2 AMR 193; [2019] 1 LNS 2065, HC (refd) F
Ross Cole Investment Corporation Limited v New Fashions Limited [1958] NZLR 55, SC (refd)
Shanmuganathan a/l Venugopal v Azizie Din [2015] MLJU 1967; [2015] 5 CLJ 1096; [2015] 4 AMR 93, HC (refd) G
Sia Siew Hong & Ors v Lim Gim Chian & Anor [1995] 3 MLJ 141; [1996] 3 CLJ 26, CA (refd)
Teja Singh v K Periasamy [1958] MLJ 81, HC (refd)
Teja Singh v Rattan Singh [1961] 1 MLJ 39, HC (refd) H
Veetak Enterprise Sdn Bhd v Kuala Lumpur Finance Berhad [1987] 1 MLJ 407; [1985] 1 LNS 9, HC (refd)

Legislation referred to

Limitation Act 1953 I
Moneylenders Act 1951 ss 16, 16(1), (2), 19, 21, 23, 27
Moneylenders Amendment Act 1933 [NZ] s 8
Rules of Court 2012 O 18 r 19(1)(b), (1)(d)
Statutes Amendment Act 1936 [NZ] s 55

Appeal from: Civil Appeal No WA-12ANCC-93–11 of 2019 (High Court, Kuala Lumpur)

Lua Ai Siew (Sim Shyr Jinn with her) (Soo Thien Ming & Nashrah) for the appellant.

Alfred Lai Choong Wui (Brian Ernst Cummings with him) (Alfred Lai & Partners) for the respondent.

Nantha Balan JCA (delivering judgment of the court):

INTRODUCTION

[1] There are two appeals before us, namely Civil Appeal No W-04(IM)(NCC)-700–12 of 2019 ('Appeal 700') and Civil Appeal No W-04(IM)(NCC)-701–12 of 2019 ('Appeal 701'). Both appeals originated from suits that were filed in the sessions court. For convenience, the parties shall be referred to by the titles that were assigned to them in the sessions court. Thus, the appellant shall be referred to as ('the defendant') and the respondent as ('the plaintiff'). The present appeals are directed at the decision of the High Court dated 3 December 2019. The appeals involve the same parties and similar factual background. The legal issues are common to both appeals. As such, our decision in respect of Appeal 700 will bind Appeal 701.

[2] The plaintiff is a licenced moneylender. The defendant borrowed monies from the plaintiff. The defendant made some payments and then they defaulted. The plaintiff filed an action in the sessions court for the recovery of monies that were lent to the defendant. The defendant alleged that the relevant moneylending agreement contravened the Moneylenders Act 1951 ('the Act'). They applied under O 18 r 19(1)(b) and (1)(d) of the Rules of Court 2012 to strike out the suit. However, the application to strike out the suit was dismissed by the sessions court.

[3] On appeal, the High Court allowed the defendant's appeal and struck out the suit. However, the High Court also granted liberty to the plaintiff to file a fresh suit.

[4] Although the suit was struck out by the High Court, the defendant nevertheless appeals to this court and contends that the plaintiff should not have been granted liberty to file a fresh suit. The appeal herein is against that part of the decision of the High Court which granted liberty to the plaintiff to file a fresh suit.

[5] On 10 June 2020, we allowed Appeal 700 and Appeal 701 and set aside that part of the learned judge's decision to grant liberty to the plaintiff to file a

fresh suit. These are the reasons for our decision. The facts narrated below are derived from Appeal 700.

THE FACTS

[6] On 29 December 2017, the plaintiff and the defendant entered into a moneylending agreement ('the agreement') whereby the plaintiff agreed to provide a loan of RM500,000 to the defendant with interest at the rate of 18%pa. The other terms of the agreement are:

(a) the defendant shall repay the loan in instalments which are to be paid by the 29th of every month for 36 months beginning with the first instalment on 29 January 2018; and

(b) the plaintiff shall be entitled to charge simple interest at the rate of 8%pa on the unpaid loan together with interest that is due from the date of default in repayment until the date of payment.

[7] The loan was released to the defendant on 29 December 2017 which is the same date as the agreement. A stamped copy of the agreement was delivered to the defendant on 28 June 2018.

[8] After making some instalment payments, the defendant defaulted in the loan repayments. By a letter of demand dated 15 February 2019, the plaintiff demanded the outstanding sum of RM75,915.07 and notified the defendant that the agreement will be deemed terminated if the defendant failed to settle the said outstanding sum within 14 days from the date of the letter of demand.

[9] The defendant failed to pay the outstanding sum that was claimed in the letter of demand. According to the plaintiff, the agreement was deemed terminated on 2 March 2019 and all the unpaid instalments under the agreement became due and payable on 2 March 2019.

[10] On 26 March 2019, the plaintiff commenced the action against the defendant claiming for repayment of the sum of RM325,677.77 which was due and owing under the agreement.

[11] The stance taken by the defendant is that the plaintiff had breached various provisions of the Act. For purposes of this appeal, counsel for the defendant relied on s 16 of the Act and contended, inter alia, that the agreement was in breach of s 16 of the Act because the loan was remitted to the defendant before a stamped copy of the agreement was delivered to the defendant. In this regard, reference was made to paras 5–6 of the statement of claim which reads as:

5. Plaintif telah menjalankan tanggungjawabnya menurut Perjanjian Pinjaman tersebut dengan memberi pinjaman sebanyak RM500,000 kepada Defendan melalui kiriman wang ke akaun UOB Defendan pada 29.12.2017.

6. Pada 28.6.2018, satu Salinan setem Perjanjian Pinjaman tersebut telah diserahkan kepada Defendan.

[12] In the defence dated 3 May 2019, the defendant stated:

5. Defendan mengatakan dan akan mengatakan bahawa dalam semua keadaan kes ini, perjanjian tersebut adalah tidak sah, salah di sisi undang-undang dan tidak boleh dikuatkuasakan kerana melanggari Akta Pemberi Pinjam Wang 1951 ('Akta tersebut').

(1) Sebagaimana yang diplidkan oleh plaintif, wang telah dipinjamkan kepada defendan pada 29.12.2017 sebelum sesalinan perjanjian yang telah disetemkan diserahkan kepada defendan pada 28.6.2018, dengan itu melanggari seksyen 16 Akta tersebut.

[13] Section 16 of the Act unequivocally provides that the stamped copy of the agreement must be delivered to the borrower before the loan is disbursed. It reads as:

16 Moneylending agreement to be given to the borrower

(1) No moneylending agreement shall be enforceable unless the agreement has been signed by all the parties to the agreement and *a copy of the agreement duly stamped is delivered to the borrower by the licensee* before the money is lent.

(2) *A licensee who executes a moneylending agreement which does not comply with this section shall be guilty of an offence under this Act* and shall be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding twelve months or to both. (Emphasis and underlining added.)

[14] In moving to strike out the suit, the defendant also alleged that the agreement was illegal as it contravened s 23 of the Act due to the imposition of a processing fee of RM10,000 which has been paid. The defendant further contended that there was a breach of s 27 of the Act as the copy of the agreement was not attested.

[15] The defendant also argued that the plaintiff was in breach of s 21 of the Act as it did not produce with the writ and statement of claim, a statement of account as prescribed in s 19 of the Act.

[16] Based on all these contraventions of the Act, the defendant applied to strike out the plaintiff's claim. The defendant's application was dismissed by the learned sessions court judge ('the SCJ'). The defendant then appealed to the

High Court. The learned judge of the High Court ('the judge') allowed the defendant's appeal and struck out the suit. A

[17] However, the judge also gave liberty to the plaintiff to file a fresh suit. The decision of the High Court is reported as *Powernet Industries Sdn Bhd v Golden Wheel Credit Sdn Bhd* [2019] MLJU 1865; [2020] 2 AMR 193; [2019] 1 LNS 2065 (HC). B

[18] The defendant's several complaints of contravention of the provisions of Act were dealt with by the judge as follows: C

(a) the judge held that s 23 of the Act does not prohibit the imposition of a processing fee;

(b) as for the complaint that the agreement was not attested, the judge held that there was an issue to be tried with respect to whether the agreement was attested per s 27 of the Act. The judge came to this conclusion as there were two versions of the agreement; D

(c) in this regard, the plaintiff's version of the agreement had the attestation whilst the defendant's version of the agreement did not have the requisite attestation. The judge therefore opined that this was a disputed issue which could only be resolved at trial; E

(d) as for the non-compliance with s 21 of the Act by reason of the failure to produce a statement of account (per s 19 of the Act) together with the writ and statement of claim, the judge held that the non-compliance rendered the suit incompetent; and F

(e) the suit was struck out. However, the judge gave the plaintiff liberty to file afresh.

[19] In so far as the complaint with regard to s 16 of the Act is concerned, the chronology of events/dates indisputably show that a stamped copy of the agreement was not delivered to the defendant before the monies were lent. G

[20] However, it was contended by the plaintiff that the defendant is estopped from raising the issue of non-compliance with s 16 of the Act as it was the defendant who were desperate for the funds and had *waived* compliance with the provisions of the Act. H

[21] In this regard, the plaintiff relied on the affidavit of Woo Wai Mun ('Woo') (a director of the defendant from 30 September 2015–12 February 2019) which was affirmed on 10 June 2019 where he stated: I

> Saya mengikrarkan afidavit ini untuk mengesahkan bahawa saya telah memaklumkan Plaintif bahawa Defendan mempunyai masalah-masalah kewangan

yang mana Defendan mengalami kesusahan seperti pembayaran gaji kakitangan, pembayaran pembekal-pembekal barangan dan pelbagai pembayaran untuk operasi biasa Defendan pada masa matan dan oleh itu, Plaintif dan Defendan telah bersetuju bahawa pihak-pihak melepaskan pemakaian Seksyen 16 Akta Pemberi Pinjam Wang untuk Perjanjian Pinjaman bertarikh 29.12.2017 agar wang pinjaman yang berkenaan dapat disalurkan kepada Defendan pada kadar segera.

[22] In this regard, it may be noted that the defendant, through the affidavit of Zakuan Sufi bin Abd Latib affirmed on 20 June 2019 had (via para 9) denied the said averment by Woo, inter alia, as to 'waiver' of the provision of the Act.

[23] At any rate, the only issue which was taken up on appeal before this court is whether by reason of the breach of s 16 of the Act, the suit should have been struck out regardless of whether there was any waiver of rights by the defendant at the time when the agreement was entered into and when the loan was contemporaneously disbursed to the defendant.

[24] Essentially, the plain and pertinent issue that we had to consider in the present appeal is whether an estoppel could operate to preclude the defendant from relying on the plaintiff's breach of s 16 of the Act, as a basis for contending that the agreement is null and void and unenforceable.

[25] It is of course implicit from the stand taken by the plaintiff that there was indeed a contravention of s 16 of the Act but they contend that the contravention is irrelevant as the defendant had 'waived' their right in terms of insisting on compliance with the Act.

THE HIGH COURT (S 16 OF THE ACT)

[26] The relevant paragraphs of the judgment of the judge which pertain to the discussion on s 16 of the Act are as follows:

> [12] Firstly, it is contended by the defendant that the moneylending agreement is in breach of s 16 of the MA as the loan was remitted to the defendant on December 29, 2017 before a stamped copy of the moneylending agreement was delivered to the defendant on June 28, 2018. There is no dispute that the loan was remitted to the defendant before the stamped copy of the moneylending agreement was given to the defendant.
>
> [13] Section 16 of the MA provides as follows:
>
> Moneylending agreement to be given to the borrower
>
> (1) No moneylending agreement shall be enforceable unless the agreement has been signed by all the parties to the agreement and a copy of the agreement duly stamped is delivered to the borrower by the licensee before the money is lent.

(2) A licensee who executes a moneylending agreement which does not comply with this section shall be guilty of an offence under this Act and shall be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding twelve months or to both.

[14] It would have seemed pretty clear that the moneylending agreement which is in breach of s 16 of the MA is on that ground unenforceable. However, in this case, the parties had agreed to waive s 16 of the MA as the defendant was facing critical financial problems and needed the loan to be disbursed to it immediately.

The defendant's director admitted in his affidavit that the parties had agreed to waive s 16 of the MA as the defendant was facing critical financial problems and needed the loan to be disbursed to it immediately. Also, the defendant has never raised this issue prior to these proceedings.

[15] In *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 AMR 2871; [1995] 4 CLJ 283, the Federal Court, on the doctrine of estoppel, said this:

> The time has come for this court to recognise the doctrine of estoppels is a flexible principle by which justice is done according to the circumstances of the case. Estoppel is a doctrine of wide utility and could be resorted to in varying fact patterns to achieve justice. Indeed the circumstances in which the doctrine may operate are endless.
>
> It is not an integral part of the doctrine of estoppels that a litigant who invokes the doctrine of estoppels must prove that he was induced by the conduct of his opponent to act in a particular way, as all that a representee need do is to place sufficient material before a court from which an inference may fairly be drawn that he was influenced by his opponent's acting. Likewise, the requirement that the representee should have acted to his detriment is also not part of the doctrine. In this respect, all that needs to be shown is that, in the particular circumstances of a case, it would be unjust to permit the representor or encourager to insist upon his strict legal rights. A court may permit a litigant to argue that his opponent is estopped from raising a particular contention if it is in the interest of justice to do so. It is really a matter of the case lies, must have due regard to all the circumstances of the case.

[16] The defendant argued that it is not open to the plaintiff to contend that the defendant has waived compliance with the provisions of the MA. The provisions of the MA are designed to protect the borrowers. Borrowers such as the defendant could not waive or contract himself out of the MA. The Court of Appeal in *AM-EL Holdings Sdn Bhd & 2 Ors v AEH Capital Sdn Bhd (and Another Appeal)* [2008] 4 MLJ 487; [2008] 4 AMR 193 said:

> [139] The Moneylenders Act 1951 (Act 400) has been enacted by the legislature for the protection of the borrowers and the moneylender has only himself to blame if he does not comply strictly with the provisions therein (*F Xavier v K Kathamuthu Konar* [1958] MLJ 286; and *Ang Khye Pang v Chop Ban Aik* [1939] MLJ 282).
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> According to the case of *Kartar Singh v Mahinder Singh* [1959] MLJ 248,

moneylenders must learn the importance of strict compliance with the technical requirements of the Ordinance if they wish to recover their money. And according to Raja Azlan Shah J (as His Royal Highness then was) in *Overseas Union Finance Ltd v Lim Joo Chong* [1971] 2 MLJ 124 at 126 that:

> This is indeed a lesson to be learnt by moneylenders in future to be more careful when lending money on a security and also to be sure that the Moneylenders Ordinance has been fully complied with the Moneylenders Ordinance is calculated to protect borrowers from unscrupulous moneylenders but careless moneylenders are also caught by it.

[17] I am of the view that none of the authorities cited by learned counsel for the plaintiff state that a party cannot be estopped from relying on a statute such as the MA. In fact, it is trite law that a party can be estopped from relying on a statute and there are many cases where a party is estopped, for instance, from relying on the Limitation Act.

I am of the view that whether the defendant is estopped from relying on a breach of s 16 of the MA in the facts of the present case is an issue of fact which should be decided at a full trial.

After all, it was to accommodate the situation of the defendant and for the benefit of the defendant that the loan was released immediately to the defendant and the defendant had agreed to the non-compliance with s 16 of the MA.

The question whether the defendant, having taken advantage of the benefit conferred on him can turn around and allege that the moneylending agreement is unenforceable for contravention of s 16 of the MA when parties have waived s 16, is, I think, an issue that should go for trial. I would not strike out the plaintiff's claim on this ground.

THE ARGUMENTS BEFORE US

[27] It was argued on behalf of the defendant that based on the plaintiff's pleaded case, the loan was obviously disbursed to the defendant before a stamped copy of the agreement was delivered to the defendant, and this clearly and indisputably constituted a breach of s 16 of the Act.

[28] The judge held that the plaintiff's failure to comply with s 16 of the Act 1951 did not warrant the plaintiff's claim to be struck out in view of the plaintiff's contention that the parties had agreed to waive the compliance with the said provision. But this was disputed by the defendant. Therefore the High Court held that there was a factual dispute pertaining to waiver which ought to be tried and it is not a plain and obvious ground to strike out the plaintiff's claim.

[29] The defendant's complaints in this appeal per the memorandum of appeal are as follows:

(a) the learned judge erred in law and/or in fact in granting the respondent liberty to file its claim afresh against the appellant; A

(b) the learned judge ought to have allowed the appellant's appeal without granting the respondent liberty to file its claim afresh;

(c) the learned judge ought to have held that Moneylenders Act 1951 has been enacted by the Legislature in public interest for the protection of the borrowers; B

(d) the learned judge misdirected herself when she failed to have any and/or sufficient regard to the trite law that there can be no estoppel against plea of statutory non-compliance nor waiver of compliance with statutory provisions enacted in public interest; C

(e) the learned judge erred in law and/or in fact in holding that whether the appellant is estopped from relying on a breach of s 16 of the Moneylenders Act 1951 is an issue of fact which should be decided at a full trial; D

(f) the learned judge erred in law and/or in fact in holding that whether the parties have waived s 16 of the Moneylenders Act 1951 is an issue which ought to go for trial; E

(g) the learned judge misdirected herself in law in holding that there may be estoppel against setting up non-compliance with s 16 of the Moneylenders Act 1951 and that the statutory requirements therein may be waived by the parties; and F

(h) the learned judge ought to have held that there can be no estoppel against plea of statutory non-compliance nor waiver of compliance with s 16 of the Moneylenders Act 1951 in all the circumstances of the case.

[30] It was submitted for the defendant that the High Court erred in granting the plaintiff liberty to file its claim afresh against the defendant and that the suit ought to have been struck out without liberty to the plaintiff to file its claim afresh. G

[31] Essentially, it was submitted that the plaintiff's non-compliance with s 16 of the Act is *fatal* and renders the agreement unenforceable and the claim must therefore be struck out. H

[32] It was also argued for the defendant that although with the filing of the suit afresh, the plaintiff may be able to remedy a breach of s 21 of the Act in relation to production of the accounts as an annexure to the statement of claim per s 19 of the Act, they will not be able to remedy a breach of s 16 of the Act. I

[33] It was also argued for the defendant that the judge erred in holding that

it is not a plain and obvious case to strike out the plaintiff's claim for breach of s 16 of the Act in view of the issue of waiver/estoppel which had been raised by the plaintiff.

[34] It was submitted on behalf of the defendant that the judge misdirected herself in holding that an estoppel could operate against the defendant, which precludes the setting up non-compliance with s 16 of the Act. Counsel for the defendant referred to the case of *Arjan Singh, Son of Inder Singh v Hashim Angullia & Ors* [1941] 1 MLJ 55; [1941] 1 LNS 4 (HC) ('Arjan Singh') and submitted that the Malaysian courts have consistently held that non-compliance with the provisions of the Act will entitle the defendant to have the claim dismissed with costs.

[35] In amplification, counsel emphasised that the Act was enacted for the protection of the borrowers. Counsel referred to the Preamble to the Act which reads as 'An Act for the regulation and control of the business of moneylending, the protection of borrowers of the monies lent in the course of such business, and matters connected therewith'.

[36] Further, counsel for the defendant emphasised that as a licensed moneylender, the plaintiff must strictly comply with the provisions of the Act. Counsel referred to the Court of Appeal's decision in *AEH Capital Sdn Bhd v AM-EL Holdings Sdn Bhd and another appeal* [2008] 4 MLJ 487 (CA) at p 544 where it was held:

> [139] ... The Moneylenders Act 1951 (Act 400) have been enacted by the legislature for the protection of the borrowers and the moneylender has only himself to blame if he does not comply strictly with the provisions therein (*F Xavier v K Kathamuthu Konar* [1958] MLJ 286; and *Ang Khye Pang v Chop Ban Aik* [1939] MLJ 282). According to the case of *Kartar Singh v Mahinder Singh* [1959] MLJ 248, moneylenders must learn the importance of strict compliance with the technical requirements of the Ordinance if they wish to recover their money. And according to Raja Azlan Shah J (as His Royal Highness then was) in *Overseas Union Finance Ltd v Lim Joo Chong* [1971] 2 MLJ 124, at p 126 that:
>
> > This is indeed a lesson to be learnt by moneylenders in future to be more careful when lending money on a security and also to be sure that the Moneylenders Ordinance has been fully complied with the Moneylenders Ordinance is calculated to protect borrowers from unscrupulous moneylenders but careless moneylenders are also caught by it. (Emphasis and underlining added.)

[37] Counsel also referred to the following cases and argued that there can be no waiver of compliance of the provisions in the Act:

(a) *Arjan Singh*;

(b) *Teja Singh v Rattan Singh* [1961] 1 MLJ 39 (HC); and

(c) *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346; [2001] 2 CLJ 321 (CA).

[38] Counsel also referred to the case of *Teja Singh v K Periasamy* [1958] MLJ 81 (HC), where the court dismissed the applicant's application for leave to realise his security in view of breach of s 16 of the Moneylenders Ordinance 1951. In that case, the loan sum was passed to the borrower before the relevant loan agreement in the form of bill of sale was handed over. Justice Smith held at p 83 as follows:

> Section 16 of the Moneylenders Ordinance protects the borrower by ensuring that he is in possession of the terms of his contract of repayment before he actually receives the loan.
>
> ...
>
> I find myself in the same situation as the court in the case of *Sadhu Singh v Sellathurai* [1955] 1 MLJ 117, at p 119 penultimate paragraph in that I have sympathy for the applicant but feel that I cannot fly in the face of the Moneylenders Ordinance.

[39] Counsel also referred to the Federal Court's decision in *Chase Perdana Bhd v Md Afendi bin Hamdan* [2009] 6 MLJ 783; [2009] MLJU 717 (FC) where it was held (p 790) that the requirement for the approval of the Foreign Investment Committee ('FIC') as a condition precedent for the purchase of shares cannot be waived because the relevant statutory provision in relation the FIC's approval was enacted for the benefit of the public.

[40] The Federal Court held that:

> [18] The law on this is quite established. Once it is enacted by legislation that parties are required to comply with any provision, parties must comply with such provision. It is not for any person to waive legislative requirements by an agreement unless the legislation allows it to be done. Legislation enacts laws which in its opinion are for the benefit of the public. It is not for the courts, or anybody for that matter, to say that it need not be followed.

[41] Counsel for the defendant contended that the Act was meant to protect borrowers. As such, it is not open for the plaintiff to contend that the defendant is estopped from relying on a breach of s 16 of the Act.

[42] In this regard, counsel for the defendant also referred to the Privy Council's decision in *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] 1 MLJ 49; [1964] AC 993 (PC) ('Kok Hoong'). In that case, the Privy Council acknowledged that estoppel may operate in respect of some procedural statutes. However, in so far as moneylending is concerned, the Privy Council opined that estoppel does not operate against the provisions of the Moneylenders

Ordinance. In this regard, Viscount Radcliffe (pp 54–55) opined:

> ... there are statutes which, declaring transactions to be unenforceable or void, are nevertheless not essentially prohibitory and so do not preclude estoppels. One example of these is the Statute of Frauds (see *Humphries v Humphries* [1910] 2 KB 531, in which it was no doubt considered that, following *Leroux v Brown* 12 CB 801, the statute ought to be treated as regulating procedure, not as striking at essential validity): another is the Stamp Act or Acts in their application to oral contracts of marine insurance, which, according to the decision in *Barrow Mutual Ship Insurance Co v Ashburner* 54 LJNSQB 377, are not prohibited so much as penalised.
>
> It has been said that *the question whether an estoppel is to be allowed or not depends on whether the enactment or rule of law relied upon is imposed in the public interest or 'on grounds of general public policy*' (see *In re a Bankruptcy Notice*, at p 97, per Atkin LJ). But a principle as widely stated as this might prove to be rather an elusive guide, since there is no statute, at least public general statute, for which this claim might not be made.
>
> In Their Lordships' opinion a more direct test to apply in any case such as the present, where the laws of money lending or monetary security are involved, is to ask whether the law that confronts the estoppel can be seen to represent a social policy to which the court must give effect in the interests of the public generally or some section of the public, despite any rules of evidence as between themselves that the parties may have created by their conduct or otherwise. Thus the laws of gaming or usury (*Carter v James* 13 M & W 137) override an estoppel: so do the provisions of the Rent Restriction Acts with regard to orders for possession of controlled tenancies (*Welch v Nagy* [1950] 1 KB 455).
>
> General social policy does from time to time require the denial of legal validity to certain transactions by certain persons.
>
> This may be for their own protection, as in the case of the infant or other category of person enjoying what is to some extent a protected status, or for the protection of others who may come to be engaged in dealings with them, as, for instance, the creditors of a bankrupt. In all such cases there is no room for the application of another general and familiar principle of the law that a man may, if he wishes, disclaim a statutory provision enacted for his benefit, for what is for a man's benefit and what is for his protection are not synonymous terms. Nor is it open to the court to give its sanction to departures from any law that reflects such a policy, even though the party concerned has himself behaved in such a way as would otherwise tie his hands. See *In re Stapleford Colliery Co* 14 Ch D 432 at p 441 per Bacon VC.
>
> *These principles*, as Their Lordships understand them, *would point very directly to the* conclusion that there can be no estoppel in face of the Moneylenders Ordinance, *since the provisions on which the plaintiff seeks to rely* render him a 'protected person' for this purpose, nor any estoppel in the face of the Bills of Sale Ordinance, the provisions of which, whatever other purposes they may serve, are at least intended for the protection of other creditors who may have dealings with the borrower. (Emphasis and underlining added.)

[43] Counsel for the defendant said that the judge's conclusion in the present case that a party can be estopped from relying on a statute such as Limitation Act 1953 (see: *Alfred Templeton & Ors v Mount Pleasure Corp Sdn Bhd* [1989] 2 MLJ 202; [1989] 1 CLJ 693; [1989] 1 CLJ Rep 219 (HC)), does not apply to matters relating to non-compliance with the provision of the Act. Further, it was argued that as a licensed moneylender the plaintiff would have knowledge and would be aware of the relevant statutory provisions. It was argued for the defendant that the plaintiff cannot claim that it is not aware of the illegality.

[44] In *Shanmuganathan a/l Venugopal v Azizie Din* [2015] MLJU 1967; [2015] 5 CLJ 1096; [2015] 4 AMR 93 (HC) para [31], the High Court (per Komathy JC — as she then was) held that it is not open to a licensed moneylender to say that he was unaware of the illegality of the moneylending agreement because it is his business to know the provisions of the law pertaining to his trade. In that case, the High Court held:

> [31] But even if I am wrong about that, there is another ground on which it can be said that the claim for restitution is bound to fail. This is based on the principle that to invoke s 66, the applicant must show that he was unaware of the illegality at the time of the transaction in question. In the present case, there is no evidence that the plaintiff was unaware of the illegality of the moneylending agreement at the time it was signed. *Indeed it is not open to a licensed moneylender to plead so because it is his business to know the provisions of the law pertaining to his trade.*

[45] Consequently, based on the principles that were established or recognised in the cases referred to, it was submitted that the judge ought to have held that there can be no estoppel against a plea of statutory non-compliance nor can there be a waiver of compliance with s 16 of the Act. As such, the suit ought to have been struck out without liberty to file afresh.

[46] I turn now to the plaintiff's argument. The main argument that was advanced on behalf of the plaintiff is that it is inequitable for the defendant to raise non-compliance with s 16 of the Act as the defendant had agreed not to insist upon their strict legal rights under s 16 of the Act when the money was lent before a stamped copy of the agreement was sent to the defendant.

[47] This is because the defendant was facing critical financial problems at the material time and they needed the money to be released immediately. In this regard, Woo, who was the managing director of the defendant at the material time confirmed that the defendant needed the funds urgently and agreed to waive compliance with the provisions under the Act, including s 16 of the Act.

[48] Therefore, it was argued for the plaintiff that the defendant must be

A equitably estopped from taking advantage of the plaintiff by relying on s 16 of the Act to render the agreement unenforceable.

[49] According to the plaintiff, it is the defendant who induced the plaintiff into releasing the money immediately upon signing of the agreement and the plaintiff has done so relying on the defendant's promise that the defendant will waive their strict legal rights under s 16 of the Act.

[50] Counsel's argued that in these circumstances, it would be inequitable to permit the defendant to rely on the plaintiff's non-compliance with s 16 of the Act. Counsel relied on the decision of Justice McCarthy in *Ross Cole Investment Corporation Limited v New Fashions Limited* [1958] NZLR 55 ('Ross Cole') to support his theory that it would be inequitable to allow the defendant to rely on the plaintiff's non-compliance with s 16 of the Act. That case concerned a moneylending transaction and the borrower opposed the claim on the basis that the lender had breached s 8 of the Moneylenders Amendment Act 1933 ('s 8').

[51] According to the facts as stated in the report, the case concerned a contract for repayment of a loan, to which s 8 applied. Section 8 reads as:

> 8 Money-lenders Amendment Act 1933 New Zealand
>
> (1) No contract for the repayment by a borrower of money lent to him or to any agent on his behalf contracts by a money-lender after the commencement of this Act or for the payment by him of interest on money so lent, and no security given by the borrower or by any such agent as aforesaid in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract is signed personally by the borrower, and unless a copy thereof is delivered or sent to the borrower within seven days of the making of the contract, and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not signed by the borrower before the money was lent or before the security was given, as the case may be.

[52] In *Ross Cole*, the moneylending contract was embodied in a debenture which had been executed by the borrower company. However, the debenture did not state the rate of interest in the manner as required by that section, and there may have been a further breach of s 8 in that no separate memorandum of the contract was handed over.

[53] The facts disclosed that (a) terms of the loan were well known to the borrower company; (b) it knew that the advance would not be made until the lender company had obtained a licence under the Moneylenders Act 1908; (c) it was satisfied (and, indeed, pleased) with the transaction; (d) it was at the time advised by a competent and experienced firm of solicitors; and (e) the

borrower company was not in any way prejudiced by the lender company's non-compliance with s 8.

[54] In *Ross Cole*, despite the breach of the statutory provision, the court invoked its powers under s 55 of the Statutes Amendment Act 1936, which empowered the court to declare that the moneylending agreement was enforceable despite the fact that it was in contravention of the Moneylenders Amendment Act 1933. In that case, the moneylending agreement was 'saved' because of s 55 of the Statutes Amendment Act 1936.

[55] At p 56 of the judgment (after referring to s 8), McCarthy J said:

> The rigidity of these provisions was ameliorated by s 55 of the Statues Amendment Act 1936 which provides that notwithstanding the provisions of s 7 (which has no bearing in this case) or s 8 of the Statutes Amendment Act 1933, the Court if it is satisfied that in the circumstances it would be inequitable that any money lending transaction or contract for the repayment by a borrower of money lent to him to which either of those sections applies should be held illegal or unenforceable as the case may be, may declare that such transaction is legal or that such contract is enforceable.

[56] At p 59, the judge said:

> ... provisions of ss 7 and 8 of the Moneylenders Amendment Act 1933 are designed primarily for the protection of borrowers, and are not intended for the benefit of creditors.

[57] Upon a consideration of all the facts and being satisfied that the borrower was not prejudiced by the non-compliance with s 8 of the Moneylenders Amendment Act 1933, the learned judge in *Ross Cole* invoked his discretionary power under s 55 of the Statutes Amendment Act 1936 and held that 'That, in the circumstances, it would be inequitable that the contract should be held unenforceable; and accordingly a declaration would be made, under s 55 of the Statutes Amendment Act 1936, that it was enforceable'.

[58] Counsel for the plaintiff also referred to *Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1995] 3 MLJ 141; [1996] 3 CLJ 26 (CA) which held that based on the terms of the contract of guarantee, the defendant was estopped from raising the issue of time-bar under the Limitation Act 1953.

[59] In that case the Court of Appeal held:

> There is an alternative ground upon which the High Court could have held limitation not to apply in this case, although I do not decide this appeal upon it because it was neither raised nor argued. It has to do with the final clause in the

document whereby the defendants agreed that the plaintiffs may enforce the 'guarantee' at any time.

Now, that appears to me to be a promise for value by which the defendants bound themselves not to raise limitation as a defence to an action brought to enforce the contract.

In such circumstances, it seems quite plain that the defendants ought not to be permitted to go back on their word. It would be quite unjust and inequitable to permit them to do so. Had the point been taken, there would have been no difficulty in holding that the defendants ought to be estopped from pleading the statute. The doctrine of estoppel — whether one calls it promissory estoppel, estoppel by encouragement or estoppel by convention does not really matter — has reached such a stage that it may be used to deprive a litigant of the benefit of a procedural statute such as the Limitation Act 1953. The law upon this subject has been stated by Edgar Joseph Jr J (as he then was) in *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 at pp 244–245. A reading of His Lordship's judgment in that case has left me with the impression that little or nothing may be usefully added to the learning contained therein.

[60] It was therefore argued that in the present case, the defendant is relying on the Act to take advantage of the plaintiff by breaching its own promise which induced the plaintiff into releasing the loan before a stamped copy of the agreement was delivered to the defendant, albeit that it was contrary to s 16 of the Act. Hence, equitable estoppel must be invoked to assist the plaintiff.

[61] Counsel for the plaintiff also emphasised that in dismissing the defendant's application to strike out the suit, the SCJ had found that the defendant is estopped from raising objection under s 16 of the Act based on the following reasons:

(a) the defendant never raised any objection from the date of commencement of the moneylending transaction to the date that the suit was filed;

(b) the objection was only raised when the suit was filed; and

(c) Woo, who was the defendant's director at that material time, has confirmed in his affidavit dated 10 June 2019 that the parties agreed to forgo strict application of s 16 of the Act because the defendant was facing a critical financial problem at the material time and needed the loan to be released immediately.

[62] Counsel for the plaintiff said that in view of the defendant's agreement to waive the strict application of s 16 of the Act, the question of whether the defendant, having taken advantage of the benefit conferred on him can subsequently turn around and allege that the agreement is unenforceable because of contravention of s 16 of the Act when parties have waived the

provision, is an issue that should go for trial.

OUR ANALYSIS

[63] At the outset, it is important to emphasise that s 16(1) of the Act renders a moneylending agreement unenforceable unless a stamped and signed copy thereof is delivered to the borrower before the money is lent. In this regard, s 16(1) of the Act, reads relevantly, 'No moneylending agreement shall be enforceable unless the agreement has been signed by all the parties to the agreement and a copy of the agreement duly stamped is delivered to the borrower by the licensee before the money is lent'. Next, it is important to note that s 16(2) of the Act, provides that a moneylender who is in breach of the said provision, is guilty of an offence. Lastly, the Preamble to the Act states that the Act was enacted to regulate and control the business of moneylending, and to protect borrowers.

[64] The underlying reason for the imperative need for the duly stamped copy of the agreement to be given to the borrower before the money is lent was lucidly postulated by Smith J in the case of *Teja Singh v K Periasamy*, where the High Court dismissed the applicant's application for leave to realise his security in view of a breach of s 16 of the Moneylenders Ordinance 1951. In that case, the loan sum was passed to the borrower before the relevant loan agreement in the form of bill of sale was handed over. At p 83 Smith J explained that:

> Section 16 of the Moneylenders Ordinance *protects the borrower by ensuring that he is in possession of the terms of his contract of repayment before he actually receives the loan*.

[65] It is relevant to note that, whilst expressing sympathy for the moneylender, the learned judge nevertheless said or lamented, 'I cannot fly in the face of the Moneylenders Ordinance'.

[66] At any rate, it is quite clear and unarguable that the Act was enacted to regulate and control the business of moneylending and (relevantly) to protect borrowers. Indeed the Preamble to the Act says so in so many words. Nothing can be clearer. Now, having established that the Act was enacted to, inter alia, 'protect' borrowers and not just to confer a benefit on them, can it be said that the non-compliance with s 16 of the Act can be excused or condoned on the basis that the defendant had (because they were desperate for the funds) 'waived' the need for compliance with the very provision which was enacted to protect the defendant (borrower).

[67] The plaintiff says that based on the circumstances of the present case, it would be inequitable to allow the defendant to take advantage of the Act when it was the defendant who had waived their rights and the loan given in reliance

upon such waiver. As such, it is contended that the defendant should be estopped. For our part, we may go so far as to say that the defendant's conduct in the present circumstances is morally reprehensible. It may even be inequitable. However, as Edgar Joseph Jr said in *Co-operative Central Bank Ltd (in receivership) v Feyen Development Sdn Bhd* [1995] 3 MLJ 313; [1995] 1 AMR 2751 (FC), we are a 'court of law and not a court of morals' (p 321 MLJ).

[68] The jurisprudence on this area of the law is quite settled and there can be no estoppel against statutory provisions. See *Veetak Enterprise Sdn Bhd v Kuala Lumpur Finance Berhad* [1987] 1 MLJ 407; [1985] 1 LNS 9 (HC) ('Veetak') per Gun Chitt Tuan J (as he then was).

[69] In *Veetak* the learned judge said (p 410 MLJ):

> It was another submission of counsel for the plaintiff that the defendant could not raise the issue of estoppel and he referred to the former Court of Appeal case of *Puran Singh v Kehar Singh Bahadur Singh* [1939] MLJ 71 at p 75; [1937] 1 LNS 51 at p 75. In that case reference was made by Thomas CJ to *Barrow's case* [1880] 14 Ch D 432 in which was stated by Bacon VC in the course of his judgment that:
>
> > the doctrine of estoppel cannot be applied to an Act of Parliament. Estoppel only applies to a contract *inter partes* and it is not competent to parties to a contract to estop themselves or anybody else in the face of an Act of Parliament.
>
> It was held by the former Court of Appeal, inter alia, that *there can be no estoppel against statutory provision in an Enactment which legislates on a matter of general interest*. (Emphasis added.)

[70] In this context, it is also necessary to refer to the case of *Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 404; [1991] 1 CLJ 656; [1991] 1 CLJ Rep 174 (SC), where the Supreme Court (per Hashim Yeop A Sani CJ) said (at p 407 (MLJ); p 179 (CLJ)):

> On the question of issue estoppel we agree with the learned judge that on the facts of this case the appellants cannot invoke the doctrine of issue estoppel. *There can be no estoppel as against statutory provisions*.

[71] In the context of moneylending legislation, it is highly relevant that in *Kok Hoong,* the Privy Council enunciated that estoppel does not operate against the Moneylenders Ordinance. Whilst taking a strict and uncompromising position, the Privy Council was nevertheless prepared to recognise that vis a vis statutes which regulate procedure and which do not represent social policy and/or public interest, an estoppel may operate to preclude a party from setting up the statutory non-compliance as a ground for escaping from their legal obligations or liability.

[72] However, the Privy Council made it quite clear that in respect of

moneylending legislation, estoppel cannot operate. In this regard, at p 54 of the judgment, the Privy Council enunciated that 'where the laws of money lending or monetary security are involved, is to ask whether the law that confronts the estoppel can be seen to represent a social policy to which the court must give effect in the interests of the public generally or some section of the public, despite any rules of evidence as between themselves that the parties may have created by their conduct or otherwise'. And at p 55 of the judgment, the Privy Council concluded, '... there can be no estoppel in face of the Moneylenders Ordinance ...'.

[73] Thus, as a general rule, there can be no estoppel against a statutory provision except perhaps where it involves procedural provisions (*Sia Siew Hong*) or does not involve pubic interest or social policy). Thus, estoppel cannot operate in respect of a statute which is intended to protect a class of persons, namely borrowers who borrow from licensed moneylenders.

[74] In this regard, it is patently obvious that the statutory protection as provided for under the Act is necessary because borrowers who approach moneylenders are 'vulnerable' persons. The borrowers are a vulnerable class because they almost always comprise of individuals or entities who/which are desperate for funds, and due to economic, societal or other historical or legacy reasons, are not able to approach conventional lenders such as banks and other financial institutions for loans in the ordinary way.

[75] They are therefore at the mercy of the moneylender, who may take advantage of the borrower's predicament and exploit or oppress them in a variety of ways. This is not to suggest that anything of this nature took place in this case. These matters have been alluded to merely to explain the *raison d'être* of the Act.

[76] It is important to emphasise that s 16 of the Act 'protects the borrower by ensuring that he is in possession of the terms of his contract of repayment before he actually receives the loan' (per Smith J in *Teja Singh v K Periasamy*).

[77] There is no doubt that s 16 of the Act was intended to ensure that the duly stamped copy of the moneylending agreement was delivered to the borrower before the money is lent so that there is no dispute as to the terms of the agreement. Indeed, once the borrower is in possession of a stamped copy of the relevant moneylending agreement, then it will eliminate the possibility for any dispute later.

[78] A strict adherence to s 16 of the Act will ensure that the version of the agreement relied upon by the moneylender, will be the same document which was previously executed by the borrower. If the agreement is executed before

A the money is lent and the stamped copy is not delivered before the money is lent, but is instead delivered later, then there could be an abuse of the 'window of opportunity' and the moneylender could tamper with the agreement by replacing pages and adding more onerous terms and conditions. Indeed, in the extreme situation, even the amount lent or rate of interest could be altered. B Hence, it is obvious enough that s 16 of the Act is a necessary statutory safeguard to ensure that the moneylending agreement is not tampered with in anyway.

C **[79]** In the present case, the plaintiff's only answer to the contravention of s 16 of the Act is the 'waiver' by the defendant. The judge thought that 'waiver' was a triable issue. That may well be so. But even assuming that the plaintiff is right and there was in fact a waiver of rights, the question is whether waiver can override or overcome or defeat a breach of s 16 of the Act.

D

[80] In our view, if waiver is allowed, then it will defeat the operation of s 16 of the Act or any other provision of the Act and this will open the proverbial floodgates for a court sanctioned breach of the Act. It is not far-fetched to say that disingenuous and unscrupulous moneylenders will be able to prevail upon E desperate borrowers to put it in writing that they (the borrowers) are waiving his rights with respect to the statutory provisions of the Act.

[81] The reality is that desperate borrowers will accede to anything that is asked of them by moneylenders. Because of their dire straits, they will sign F anything that is placed before them. Thus, it will take very little to persuade the borrower who will be more than willing to sign away his rights as provided for under the Act. Therein lies the obvious mischief or danger. And, it is because of this danger, that we are impelled to the view that there can be no G waiver/estoppel against the provisions of the Act, which was enacted pre-eminently to regulate the business of moneylending and to protect the borrowers.

[82] It is relevant in this context to note that a party may not contract out of H the protection which Parliament had intended that they should have. The principle in this regard is to be found in the decision of the House of Lords in: *Johnson v Moreton* [1980] AC 37; [1978] 3 All ER 37; [1978] 3 WLR 538; 37 P & CR 243; 122 Sol Jo 697; [1978] 2 EGLR 1; 241 Estates Gazette 759.

I **[83]** The following passage from the Court of Appeal's decision in *Phileo Allied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor* [1999] 3 MLJ 157; [1999] 2 CLJ 1023 (CA) (per Gopal Sri Ram JCA at pp 185–186 (MLJ)) is also relevant and instructive:

> The authorities are unanimous upon the proposition that whether it is permissible

for a litigant to waive or contract out of the provisions of a written law depends upon the language of the particular statute. And where the language is unclear, it depends upon the purpose of the statute and upon whether its overall purpose would be defeated by permitting a waiver or contracting out.

The most recent statement of the principle is to be found in the judgment of Edgar Joseph Jr FCJ, in the landmark decision of the Federal Court in *Kimlin Housing Development Sdn Bhd (Appointed receiver and manager) (In liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805. His Lordship there said (at pp 820G–821B):

The question whether a person entitled to the performance of a statutory duty can effectively waive performance of the duty by the person bound and the latter can effectively contract out of performing the duty, depends on the language of the particular statute and, if this is not clear, on the overall purpose of the statute and whether this purpose would be defeated by permitting waiver and contracting out. *Trietel on Contract* (at p 782) has correctly pointed out:

> Difficult questions can arise where a person attempts by contract to waive a right conferred on him by statute. Although there is a general principle that a person may waive any right conferred on him by statute (*quilibet potest renunciare juri pro se introducto*), difficulties arise in determining *whether the right is exclusively personal or is designed to serve other more broad public purposes. In the latter situation, public policy would require that the right be treated as mandatory and not be waivable by the party for whose benefit it operates*. Whether a statutory right is waivable depends on the overall purpose of the statute and whether this purpose would be frustrated by permitting waiver.

[84] Based on the principles enunciated in the cases mentioned above, we are of the view that the Act is a manifestation of a social legislation and is designed to regulate the business of moneylending and to protect borrowers. As such, regardless of the circumstances which gave rise to the waiver/estoppel, a moneylender cannot rely on such waiver/estoppel to preclude the borrower from asserting his rights as provided for under the under the Act. Thus, in the context of a contravention of s 16 of the Act, it is our view that the borrower is entitled to raise and rely upon the moneylender's contravention of the Act in opposing the claim for recovery of the monies that were lent.

[85] In the present case, it is clear that the loan was released to the defendant on 29 December 2017 which is the same date as the agreement, and a stamped copy of the agreement was delivered to the defendant on 28 June 2018. It is quite unarguable that s 16 of the Act was contravened and the agreement is unenforceable. Indeed, it may be noted that the word 'unenforceable' is clearly and unambiguously stated in s 16(1) of the Act.

[86] It is of course regrettable that s 16 of the Act has been deployed to the advantage of the defendant who has enjoyed the benefit of the monies that were

A lent to them at a time when they were desperate for the funds. In these circumstances, from the plaintiff's standpoint, it is unfair to declare the agreement as unenforceable because of non-compliance with s 16 of the Act.

B **[87]** But in the absence of a statutory saving provision like the type that was applicable in the case of *Ross Cole*, the court has no choice but to apply the law and hold that the agreement as unenforceable. Consequently, as there was a breach of s 16 of the Act, and given that waiver/estoppel cannot operate against the Act, it follows that the claim against the defendant fails.

C **[88]** Finally, on the issue of 'liberty to file afresh', as correctly submitted by counsel for the defendant, the grant of liberty to file afresh may be well give an opportunity for the plaintiff to rectify the procedural non-compliance with other provisions of the Act.

D **[89]** However, non-compliance with s 16 of the Act is a different matter altogether. It is not capable of being rectified or remedied even if a fresh suit is filed. Thus, a new suit will not overcome the breach of s 16 of the Act as the events have already occurred, namely, the loan was disbursed to the defendant on or around 29 December 2017 and a stamped copy of the agreement was E only given to the defendant on 28 June 2018. The chronology of events cannot be undone. In the circumstances, the judge was plainly wrong in granting liberty to the plaintiff to file its claim afresh against the defendant as a fresh suit is doomed to fail by reason of the contravention of s 16 of the Act.

F THE RESULT

[90] In the circumstances, based on the reasons as stated above, the appeal is allowed and prayer (b) of the High Court order dated 3 December 2019 is therefore set aside. The respondent (plaintiff) is to pay costs of RM5,000 to the G appellant (subject to payment of allocatur).

Order accordingly.

H *Appeal allowed with costs of RM5,000 subject to allocator and prayer (b) of the High Court set aside.*

Reported by Mohd Kamarul Anwar

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